IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 234 OF 1996

Manjula Ramlal Barot,)
residing at Ram Niwas,)
Room No.14, Grant Road,)
Mumbai.) ...Petitioner

V/s.

1. Iswarlal P. Barot,)
residing at Sagar Tarang)
Building, 3rd Floor,)
Block No.19, Opp.Vaibhav)
Building, Beach Candy,)
Mumbai.

2. Jugaldas P. Barot,)
residing at Surya Darshan,)
3rd Floor, Block No.6,)
Walkeshwar, Mumbai.)

3. Kamlesh J. Barot,)
residing at 16-B, Keval)
Mahal, 1st Floor, Marine)
Drive, 'D' Road, Mumbai-20.)

4. Ranjit Bhanu)
residing at Sham Nivas,)
beside Sophya College,)
Bhulabhai Desai Road,)
Mumbai - 26.)

5. Rajadhyaksha,)
residing at Fisher Colony,)
Building No.5, Near)
Mahim Bus Depot,)
Mumbai.)

6. The State of Maharashtra.) ...Respondents

Mr.A.G. Sabnis, Sr.Advocate for the Petitioner.

Mr.Shirish Gupte, Sr.Advocate with Mr.Amit Joshi i/b. Nankani and Associates for respondent Nos.1, 2 and 3.

Mr.Ashok Mundargi with Mr.Ganesh Gole i/b. Mr.Arpan Rajput for Respondent Nos.4 and 5.

Mr.Rajeshree M. Gadhavi & Y.S. Shinde, APPs for the State.

CORAM : V.M. KANADE, J.

DATED : JUNE 23, 2006

ORAL JUDGMENT :-

. By this petition which is filed under Article 227 of the Constitution of India and under Section 482 of Cr.P.C., the petitioner is challenging the order passed by the Magistrate in C.C.No.47/S/84 whereby the learned Magistrate was pleased to reject the application filed by the petitioner seeking direction from the Magistrate for the production of a document from the respondents No.1 to 5 - original accused.

. Brief facts which are relevant for the purpose of deciding this petition are as under :-

2. The petitioner filed a criminal complaint in the Court of the Additional Chief Metropolitan Magistrate against the respondents No.1 to 5 for the alleged commission of offences punishable under Sections 347, 348, 386, 395, 506(ii) read with Section 120-B, 34 and 114 of the IPC.

3. It is alleged in the said complaint that the respondents forcibly took possession of the premises where the complainant was residing with her husband, after obtaining a letter signed by petitioner's husband by threatening him of dire consequences if he did not sign the said letter.

4. The petitioner had filed an application under Section 145 of the Cr.P.C. for recovery of possession and ultimately in those proceedings, possession was directed to be handed over to the petitioner of the said premises.

5. Thereafter in the criminal complaint which was filed by the petitioner in the Court of the Additional Chief Metropolitan Magistrate during the recording of the evidence of the PW 5 Bhaskar, an application was filed by the petitioner dated 24th January, 1996 calling upon respondent no.1 or any other respondent who are all accused of having committed the alleged offence to produce the original document which was alleged to be

forcibly taken from her husband while he was in police custody. In the said application it was stated that the respondent no.1 had relied upon the said document when he had filed an application for anticipatory bail in the Court of Sessions Judge at Bombay. It was further the case of the petitioner that the original writing was dated 27th July, 1983, however, the said portion was removed by respondent no.4 by tearing it off from the said document.

6. The learned Magistrate perused the application filed by the petitioner and by its order dated 24th January, 1996 rejected the said application. Being aggrieved by the said order, the petitioner has preferred this writ petition under Article 227 of the Constitution of India.

SUBMISSION :

7. The learned Senior Counsel appearing on behalf of the petitioner submitted that the learned Magistrate had rejected the application of the petitioner and had

commented upon the said document which was not produced by the respondent. He submitted that the Magistrate ought to have asked the respondent to produce the document as it was vital for proving the prosecution case against the respondents. The learned Senior Counsel invited my attention to the impugned order as also the order which was passed under the proceedings which were taken out under Section 145 of the Cr.P.C. by the petitioner. He also invited my attention to the order which is passed in revision by this Court in favour of the petitioner and to the observation made by this Court in the said order. He further invited my attention to the application for anticipatory bail which was filed by the respondent herein wherein the xerox copy of the document in question was annexed to the application. He submitted that this itself clearly proved that the document was in possession of the respondent no.1 and he was duty bound to produce the same. He further submitted that if such direction had been given by the Magistrate, it would not have been hit by the provisions of the Article 20(3) of the Constitution of India. He invited my attention to the

eleven Judge Bench Judgement of the Supreme Court in the case of **Kathi Kalu Oghad reported in A.I.R. 1961 Supreme Court 1808.** He submitted that in the said eleven Judge Bench Judgement, the Supreme Court had in terms held that a direction would be issued to a person who was in possession of such a document and it would not be hit by the provisions of Article 20(3) of the Constitution. He invited my attention to the observation made by the Supreme Court in para 11 of the said Judgment. He further submitted that the judgment of the Supreme Court in **Shyamlal's case (AIR 1965 SC 1251**) was not binding on this Court as the Hon'ble Supreme Court in the said case had not taken into consideration the ratio laid down by the learned eleven Judge Bench Judgement of the Supreme Court in **Kathi Kalu's** case (supra). He submitted that since the earlier judgment of eleven Judge Bench and subsequent judgment was of constitutional bench, the ratio of the earlier judgment would prevail and would be binding on this Court. He tried to distinguish the judgment given by the Division Bench of this Court reported in **1979 Criminal Law Journal Page 71 (Vinayak Purushottam**

Kalantre v. Vikram Balwantrao Deshmukh and others). He also relied on the Judgment of the Supreme Court in the case of **S.P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. & Ors. (JT 1993 (6) S.C.331)** in which the Supreme Court had held that a person who's case is based on falsehood can be summarily thrown out at any stage of litigation.

8. The learned Senior Counsel appearing on behalf of the respondent, on the other hand, submitted that in the judgment of the Supreme Court in the case of **Shyamlal Mohanlal V/s. State of Gujarat (AIR 1965 SC 1251),** it was clearly held that the accused could not be compelled to produce documents from his possession. He submitted that the judgment in **Shyamlal's** case which was decided by the five Judge Bench of the Supreme Court was followed by Division Bench of this Court in the case of reported in the case of **Vinayak Purushottam Kalantre** (supra). He also relied on the judgment of the **Dhulipall Veeraiah Choudhary v. Kurra Veeraiah and another (1988 Criminal Law Journal Page 274)**, the judgment of the learned Single Judge of the Andhra

Pradesh High Court. He also relied on the judgment of the Supreme Court in the case of **State of Bombay v. Kathi Kalu Oghad reported in A.I.R. 1961 Supreme Court 1808** and judgment of the Supreme Court in the case of **V.S. Kuttan Pillai v. Ramakrishnan and another reported in (1980) 1 SCC 264** and lastly on the judgment of the Supreme Court in **Smt.Parmeshwari Devi v. The State and another (AIR 1977 Supreme Court 403)**.

FINDINGS AND CONCLUSION :-

9. I have given my anxious consideration to the submissions made by the learned Senior Counsel appearing on behalf of the petitioner and learned Senior Counsel appearing on behalf of the respondent. Before I consider the rival contentions in respect of the impugned order, it would be necessary to first consider the legal position in respect of the legal submissions which are made pertaining to the right of the prosecution or the complainant to seek production of a document from an accused and also to further consider whether such a direction can be issued by the Magistrate

under Section 91 of the Code of Criminal Procedure, issuing a summons to the accused to produce the document in possession and secondly, whether such a direction is hit by the provisions of Article 20(3) of the Constitution of India.

10. The first submission of the learned Senior Counsel appearing on behalf of the petitioner is that the judgment in a case of **Shyamlal** (supra) delivered by the five Judge Bench of the Supreme Court is not binding on this Court in view of the 11 Judge Bench Judgement of the Supreme Court in the case of **State of Bombay v. Kathi Kalu Oghad reported in A.I.R. 1961 Supreme Court 1808**. I have gone through the judgment of the Supreme Court in **Kathi Kalu's** case (supra) and also in **Shyamlal's** case. I am of the view that the submissions of the learned Senior Counsel, Shri A.G. Sabnis cannot accepted. The judgment in the case of **Kathi Kalu** was delivered by the Hon'ble Supreme Court after a larger Bench was constituted in order to decide the substantial questions of law regarding the interpretation of the constitution with particular reference to clause 3 of

Article 20 and the larger Bench was also constituted to re-examine some of the propositions of law laid down by the Supreme Court in the case of **M.P. Sharma V/s. Satish Chandra (AIR 1954 SC page 300)**. In one of the appeals which was heard by the larger Bench, the facts were that three specimen handwritings of the accused were obtained on three separate sheets of paper which were marked as Exhibit 27, Exhibit 28 and Exhibit 29 and this was sought to be compared with the disputed document at Exhibit 5 and the evidence of Expert was obtained to find out whether the handwriting at Exhibit 5 of the handwritings at Exhibits 27, 28 and 29 was of the same person. At the trial and in the High Court, the question was raised regarding the admissibility of the specimen writings contained in Exhibits 27, 28 and 29 in view of the provisions of Article 20(3) of the Constitution. These specimen writings of the accused were obtained in police custody. The trial Court and High Court held that there was element of compulsion in obtaining of those handwritings at Exhibits 27, 28 and 29. The question before the Supreme Court was, therefore, (1) Whether by the production of the specimen

handwritings, Exhibits 27, 28 and 29, the accused would be said to have been a witness against himself within the meaning of Article 20(3) of the Constitution and (2) Whether the mere fact that when those specimen handwritings were given, the accused person was in police custody and this by itself would it amount to compulsion.

11. In the other criminal appeals, the facts were that there was a burglary of a shop and the number of guns and rifle were stolen. During the course of the investigation, the appellant gave information that he had buried one .22 bore rifle, two .12 bore double-barrelled guns and one .18 single-barrelled gun at a certain place. During the investigation, the police had taken possession of certain glass panes and phials from the burgled shop which bore some palm and finger impressions. In order to compare impressions of those glass panes and phials with those of the accused, the Investigating Officer got the impressions of the palms and fingers of the accused taken in the presence

of a Magistrate. The point which fell for the consideration of the Hon'ble Supreme Court was (1) Whether Section 27 of the Indian Evidence Act was violative of Article 14 of the Constitution, and (2) the impressions of the appellant's palms and fingers were taken from him after his arrest which were compared with the impressions of the glass panes and phials, were not admissible evidence in contravention of the provisions of the Article 20(3).

12. In respect of the third criminal appeal, the facts were that the Magistrate had directed the respondent to give his specimen writing and signature under Section 73 of the Indian Evidence Act. The accused persons including the respondent therein declined to give his specimen writing and signatures contending that Article 20(3) of the Constitution prohibited any such specimen be taken against the will of the accused. The learned Magistrate overruled an objection on behalf of the accused. When the matter came up before the Division Bench of the Calcutta High Court, it held that in view of the **M.P. Sharma's case**

(supra), the prohibition contained in Article 20(3) applied to the case of writings and signature being taken as directed by the Magistrate.

13. In the light of the said facts, the Hon'ble Supreme Court examined the said question. The Supreme Court observed as under in para 11 :-

> "The matter may be looked at from another point of view. The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not "to be a witness." "To be a witness" means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said 'to be a witness' to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he

has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy. Evidence has been classified by text writers into three categories, namely, (1) oral testimony; (2) evidence furnished by documents; and (3) material evidence. We have already indicated that we are in agreement with the Full Court decision in Sharma's case, 1954 SCR 1077 : (AIR 1954 SC 300) that the prohibition in cl. (3) of the Art. 20 covers not only oral testimony given by a person accused of an offence but also his written statements which may have a bearing on the controversy with reference to the charge against him. The accused may have documentary evidence in his possession which may throw some light on the controversy. If it is a document which is not his statement conveying his personal knowledge relating to the charge against him, he may be called upon by the Court to produce that document in accordance with the provisions of S.

139 of the Evidence Act, which, in terms, provides that a person may be summoned to produce a document in his possession or power and that he does not become a witness by the mere fact that he has produced it; and therefore, he cannot be cross-examined. Of course, he can be cross-examined if he is called as a witness who has made statements conveying his personal knowledge by reference to the contents of the document or if he has given his statements in Court otherwise than by reference to the contents of the documents. **(Emphasis supplied).** In our opinion, therefore, the observation of this Court in Sharma's case, 1954 S C R 1077 : (AIR 1954 S C 300) that S. 139 of the Evidence Act has no bearing on the connotation of the word 'witness' is not entirely well-founded in law. It is well established that cl. (3) of Art. 20 is directed against self-incrimination by an accused person. Self-incrimination must mean conveying information based upon the personal

knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge. For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony. When an accused is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony.' The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement.

> But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness.'."

14. The learned Senior Counsel appearing on behalf of the petitioner has relied on the portion which is underlined hereinabove in support of his submission that if the document which is sought to be produced by the accused in a case is not prepared by him and it does not convey his personal knowledge relating to the charge against him, then in such a case he can be compelled to produce that document in accordance with Section 139 of the Evidence Act.

15. The Hon'ble Supreme Court before examining the

said issue in para 16 came to the following conclusion :-

> "In view of these considerations, we have come to the following conclusions:-
>
> (1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

(2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not ’compulsion’.

(3) ’To be a witness’ is not equivalent to ’furnishing evidence’ in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.

(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showings parts of the body by way of identification are not included in the expression ’to be a witness’.

(5) ’To be a witness’ means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made

or given in Court or otherwise.

(6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing.

(7) To bring the statement in question within the prohibition of Art.20 (3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."

16. The emphasis, therefore, which is laid on the observations of the Supreme Court in para 11 by the learned Senior Counsel appearing on behalf of the petitioner cannot be read in isolation as it will have

to read in the context of the issue which was before the Supreme Court in the said case.

17. So far as the judgment of the Supreme Court in the case of **Shyamlal** (supra) is concerned, the question which fell for consideration of the constitution of the Supreme Court was whether Section 94 of the Criminal Procedure Code, 1898 was applicable to accused person. The Supreme Court in the said case held that Section 94 on its true construction does not apply to an accused person. In the said case, the Supreme Court was not required to consider whether Section 94(1) infringes the guarantee of Article 20(3). Section 94 of the old act is equivalent to Section 91 of the new Act of 1973.

18. From the facts and the issue involved in **Kathi Kalu's** case and **Shyamlal's** case, it is apparent that the questions which fell for consideration before the Supreme Court in both these cases were entirely different and therefore, there was no occasion for the Supreme Court in the subsequent case of **Shyamlal** (supra) to refer to the case of **Kathi Kalu** (supra). The

submission of the learned Senior Counsel appearing on behalf of the petitioner that the ratio laid down in **Shyamlal's** case is not good law since the case of **Kathi Kalu** was not referred to it, cannot be accepted.

19. The Division Bench judgment of this Court in the case of **Vinayak Purushottam Kalantre** (supra) also held on the point whether the provisions of Section 91 apply to the accused person and the Division Bench in terms held that in view of the judgment in **Shyamlal's** case, the provisions of Section 91 of the Code of Criminal Procedure, 1973 does not apply to the accused person. In that case also, the same submission was made as is made in the present case. The Division Bench by its Judgment dispelled the said submission on the ground that that the scope and area of consideration in **Shyamlal's** case as well as in the case of **Kathi Kalu** were wholly distinct and different and that the Judgement in **Shyamlal's** case was on the point which was directly in issue before it and therefore, was binding on the Court.

20. It is a well settled position in law so far as the binding nature of the judgments is concerned that a decision which is given by the Apex court should not be read as a statue and the ratio of the case has to be taken into consideration in the context and circumstances of the facts of the said case. The Supreme Court in catena of cases and recently the Supreme Court in the case of M/s. Zee Tele Films Ltd. and another vs. Union of India and others reported in **2005 AIR SCW 2895** has observed that the judgment delivered by the Supreme Court and the ratio which is laid down by the Supreme Court should not be read as a statue or a provision in the statue and that each judgment has to be considered on the facts of the said case and if the facts and circumstances differ from the case at hand, the Court accordingly will have to determine whether the ratio in the said case would apply to the facts which are being considered in the said case. The Supreme Court in its judgment in the case of M/s.Zee Telefilms Ltd. (supra) in paragraphs 275 and 276 observed as under :-

"275. Are we bound hands and feet by Pradeep Kumar Biswas (supra)?. The answer to the question must be found in the law of precedent. A decision, it is trite, should not be read as a statue. A decision is an authority for the questions of law determined by it. Such a question is determined having regard to the fact situation obtaining therein. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment, as is well-known, must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it [See Punjab National Bank v. R.L. Vaid and Others, (2004) 7 SCC 698]"

"276. Although, decisions are galore on this point, we may refer to a recent one in State of Gujarat and others v. Akhil Gujarat Pravasi V.S. Mahamandal and Others [AIR 2004 SC 3894]

wherein this Court held:

> ".....It is trite that any observation made during the course of reasoning in a judgment should not be read divorced from the context in which they were used."

21. Therefore, even otherwise in view of the ratio laid down by the Supreme Court in the aforesaid cases, it cannot be said that the judgment in **Shyamlal's** case is not binding on this Court or that the Judgment in **Kathi Kalu's** case not being considered by the Supreme Court in **Shyamlal's** case, later judgment is not binding on this Court.

22. Now I shall deal with the submissions made by the learned Senior Counsel appearing on behalf of the petitioner and learned Senior Counsel appearing on behalf of the respondent on the merits of the case keeping in view the observations made by the Supreme Court in the aforesaid cases. In the present case, the petitioner who is the original complainant filed a

complaint against respondents no.1 to 5 having committed offences punishable under the provisions of the IPC and during recording of evidence of PW 5 Bhaskar, an application was made dated 24th January, 1996 asking the respondents to produce the original writing which was alleged to be forcibly taken from the husband of the petitioner while he was in police custody. It is alleged that PW 5 Bhaskar prepared the document at the instance of accused no.4 and the signature of the petitioner's husband was forcibly taken. In the application that was made by the petitioner for production of the said document, it was stated that the said document was in possession of the respondents. The learned Magistrate, however, rejected the said application and it is held that the application was filed as an after thought and new theory was adopted by the prosecution after considerable lapse of time. The learned Magistrate also tried to draw certain inferences from the alleged document.

23. From the record and proceedings which have been filed, there is no indication that the legal submissions

which are made before this Court were advanced before the learned Magistrate. Perusal of the application made by the petitioner, however, clearly shows that this is an application for production of document which is alleged to be in possession of the respondents no.1 to 5 - original accused. In view of the judgment in **Shyamlal's** case, such an application is not tenable against the accused persons. The contention of the learned Senior Counsel appearing on behalf of the petitioner, therefore, cannot be accepted. The ratio of the judgment in **Shyamlal's** case which has been followed by a Division Bench of this Court in **Vinayak Kalantre's** is squarely applicable to the facts of the present case.

24. The learned Senior Counsel has also submitted that the learned Judge has erred in making the observations about the document at the stage of deciding the application for production of a document. This submission of the learned Senior Counsel will have to be accepted. It would not open for the Magistrate to make observation on the merits of the document while deciding the application of the petitioner. The observations

made, therefore, regarding the document, in question,

are set aside. However, the remaining order of the Magistrate is confirmed.

. Accordingly, Rule is discharged. Writ Petition is dismissed.

(V.M. Kanade, J.)